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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS CABRERA,

Defendant and Appellant.

B208433

(Los Angeles County
Super. Ct. No. KA 082081)

APPEAL from a judgment of the Superior Court of Los Angeles County.
George Genesta, Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence
M. Daniels and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Jose Luis Cabrera timely appealed from his conviction for making a criminal threat. The jury found true the gang allegation. The court imposed the midterm of two years, plus five years for the gang enhancement. Defendant contends there was insufficient evidence he made the criminal threats for the benefit of a gang. We affirm.

FACTUAL BACKGROUND

Cabrera's mother lived in an apartment complex in El Monte, where he sometimes visited her. On two occasions prior to February 11, 2008, Jose Bermudez, the apartment manager, warned Cabrera not to smoke marijuana outside the complex. On February 11, Bermudez saw Cabrera smoking marijuana behind the complex and told Cabrera to leave. Cabrera went to his mother's apartment, got a beer and returned. Cabrera was with three other men and a woman. Bermudez again told Cabrera to leave. Cabrera said loudly, "You be quiet. You're a fucking rat. I am from El Monte Flores, and I can kill you right now." Cabrera repeated that statement two or three times. The men Cabrera was with told him to apologize, but he did not.

Bermudez knew El Monte Flores was a gang, and he was scared by Cabrera's statements. Cabrera looked like he was reaching for something in his waistband. Bermudez asked his wife to call the police, and Cabrera left. Bermudez feared that if he did not report the incident "later on they could do something to" him.

Detective Ralph Batres of the El Monte Police Department testified as an expert on the El Monte Flores gang (Flores gang). The Flores gang has been in existence for about 60 years and has approximately 400 members. The territory of the Flores gang covers the entire city of El Monte. The Flores gang employs a distinctive hand signal and goes by the initials "E.M.F." Some of the primary activities of the Flores gang are murder, intimidation of witnesses, criminal threats, carjacking and assault with a deadly weapon. Batres, who admitted that mere membership in the gang did not constitute a

crime, estimated that approximately five percent of the crimes committed by Flores gang members were done for the benefit of the gang.

One of the purposes of the gang is to instill fear and intimidation in the community. The parties stipulated that the Flores gang is a criminal street gang within the meaning of Penal Code section¹ 186.22.

Batres had known Cabrera since Cabrera was a child and knew Cabrera was a member of the Flores gang. Cabrera had many Flores gang tattoos and had admitted to police he was a member of the Flores gang. Cabrera's crime was committed in Flores gang territory.

Batres testified that recent gang members, such as appellant, would generally begin with low level crimes, including criminal threats, and work their way up to hard-core crimes. Batres also stated mentioning the name of the gang during the commission of a crime would serve to improve and elevate a member's status within the gang and to let the victim know the crime was being committed by the Flores gang.

In Batres's opinion, if a Flores gang member was to make a threat like the one in this case to a person in Flores gang territory, the threat would be for the benefit of the gang, or for the purpose of promoting the gang, because the threat would serve to instill fear and intimidation in the community. Not only would Cabrera's loud threat intimidate and frighten Bermudez, but also the neighbors, "[P]eople talk. . . . One neighbor talks to another neighbor, and it goes on and on. And the next thing you know, the entire complex is in fear of El Monte Flores gang. And that's how it benefits."

Batres explained the fact Cabrera invoked the Flores gang in the threat itself changed things. "Now it's no longer a straight threat. Now you're including the entire gang, 400 members. Now, you know, I'm threatening you, but 'I'm so and so. I'm from this gang.' And that's where the rules change." The threat would also generate respect within the gang community.

¹

All statutory references are to the Penal Code.

Cabrera presented no evidence at trial.

DISCUSSION

Appellant contends there was insufficient evidence he made criminal threats for the benefit of the Flores gang with the specific intent to promote, further or assist the gang as contemplated by section 186.22, subdivision (b)(1). Appellant does not dispute that he was a member of the Flores gang, that the Flores gang was a criminal street gang, or that the Flores gang had as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute (i.e., the Street Terrorism Enforcement and Prevention Act, § 186.20 et seq.).

“The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [¶]

‘Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.’” (Citations omitted.) (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224 [same test applies to a challenge to a gang enhancement].)

An expert may testify as to “whether and how a crime was committed to benefit or promote a gang.” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Batres, the expert, opined that if a Flores gang member were to make a threat like the one in this case to a person in Flores gang territory, the threat would be for the benefit of the gang, or for the purpose of promoting the gang, because the threat would serve to instill fear and intimidation in the community. Batres noted the complex was in the territory of the Flores gang and the threat would instill fear and intimidation in all the people living in the complex. Batres further explained people would not report crimes to the police because they would be considered “a rat” and would know there was “a whole bunch of gang members” who might take them out if they reported crimes to the police. Batres also opined that when you threaten someone by saying you are from a gang, that person “will be scared the rest of his life by any gang member that walks by.”

Batres also explained the fact Cabrera invoked the Flores gang in the threat itself changed things. “Now it’s no longer a straight threat. Now you’re including the entire gang, 400 members. Now, you know, I’m threatening you, but ‘I’m so and so. I’m from this gang.’ And that’s where the rules change.” The threat would also generate respect within the gang community.

In *People v. Augborne* (2002) 104 Cal.App.4th 362, a similar case, the victim was a caretaker of an apartment complex where the defendant and his fellow gang members congregated. The caretaker asked one of defendant’s companions to move his car from a tenant’s parking space, and the companion began yelling profanity. (*Id.*, at p. 366.) The defendant threatened to kill the apartment manager. When the victim returned to her apartment, the defendant stood next to the caretaker, balled up his fists, kicked down her door, and repeatedly threatened to kill her saying it was on the local gang (the name of the gang is not given), and the next day, the caretaker noticed gang graffiti on the wall next to her door. (*Id.*, at p. 367.) The expert opined “the criminal threats in this case were committed at the direction, for the promotion, and assistance of criminal conduct by the gang members.” (*Id.*, at pp. 372-373.) The court held the expert’s “fact-based specific opinion and instances of past criminal activities constituted substantial evidence

to support the implied finding the crimes were committed to promote gang activities.” (*Id.*, at p. 373.)

Appellant suggests he committed no act which would corroborate Batres’s testimony he was attempting to benefit the gang and elevate his status in the gang, he had been scolded by Bermudez in the past and simply left the area without incident, there was no evidence of gang graffiti or gang-related symbols to put the residents on notice of the gang’s intentions, he later attempted to apologize for his behavior, he made a fleeting single reference to the gang, there was no evidence he had ever engaged in any violent acts or witness intimidation, and the only one he was trying to benefit was himself. Appellant also suggests the threat was a tantrum of a typical teenager who happened to be a gang member Appellant is simply viewing the evidence in his favor.

Even though the circumstances in the case at bar were not as egregious as those in *Augborne*, they still support an inference of benefit for the gang. Appellant was a known gang member and the apartment complex was located in the territory of the Flores gang. Although appellant had left when scolded by Bermudez in the past and had no known prior violent acts, the jury still believed he had made criminal threats; an escalation in his behavior. At the time appellant threatened to kill Bermudez, he was reaching for his waistband and did not apologize even though his companions urged him to do so. Most critically, appellant invoked the name of gang as part of the criminal threat, which he repeated two or three times. The use of the gang name caused fear in the victim. The gang-related act was controlling the neighborhood by fear and intimidation. Thus, the threat itself qualified as a gang-related criminal activity. (See *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [What is required is the specific intent to promote, further, or assist any criminal conduct by gang members. “[D]efendant’s own criminal threat qualified as the gang-related criminal activity”].)

Thus, Batres’s opinion about the threat benefitting the gang by creating fear and intimidation supported the gang enhancement even if his opinion about the threats also elevating a member’s status in the gang was unsubstantiated, i.e., Batres admitted he had

no personal knowledge appellant's statement to Bermudez had been communicated to other Flores gang members. Moreover, Batres did not testify about appellant's intent as appellant claims in his opening brief. (See *In re Frank S. supra*, 141 Cal.App.4th at p. 1197 [opinion a specific individual possessed a specific intent exceeds the type of opinion allowed by a gang expert].)

The expert's testimony also provided the basis upon which the jury could infer the specific intent to benefit the Flores gang. (See *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513-1514; *People v. Romero, supra*, 140 Cal.App.4th at pp. 19-20; *People v. Morales, supra*, 112 Cal.App.4th at pp. 1198-1199.)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.